## Alltel Pennsylvania, Inc. and International Brotherhood of Electrical Workers, Local Union 2089, AFL-CIO. Case 6-CA-26073

# April 10, 1995

## **DECISION AND ORDER**

## BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On November 10, 1994, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

#### The November 23 Interview

On November 23, 1993,<sup>2</sup> unit employee Robert Crytzer was told by Plant Manager Gary Ross to report to the front office. Unlike occasions in the past, on this day Ross said nothing about any forthcoming discipline. When Crytzer arrived at the front office, he was met by the chief executive of the plant, Vice President Clark Hoffman, and an official in charge of plant security and investigations, John Cupples. The subject of the meeting was a suspected false claim for a \$95.47 hotel bill on a travel voucher submitted by Crytzer.

Crytzer testified to a version of this meeting that differs significantly from that related by Hoffman and Cupples. According to Crytzer, Hoffman walked into the meeting, pointed a finger at Crytzer, and stated that "what you did was wrong . . . I am going to prosecute you . . . I don't care if you have a union representative or a lawyer sitting beside you . . . we're going through with this." Crytzer testified that Hoffman then left the room and that Crytzer turned to Cupples and said, "John, what would you do in my

place? Would you get a union rep or a lawyer?" Crytzer states that Cupples answered, "Well, Clark's a fair guy. Just tell us what happened." Asserting that he didn't want to make Hoffman any madder than he was, Crytzer told Cupples what had happened. The meeting ended with Crytzer signing a 12-line typed statement wherein he admitted misappropriating the amount in question. Crytzer was subsequently fired for submitting a false travel voucher.

Hoffman testified that he opened the November 23 meeting with Crytzer by stating that Crytzer had been called to discuss a very serious matter and that Crytzer had the right to union representation at the meeting. Hoffman testified that Crytzer did not ask for union representation at that time or at any time during the meeting. Cupples testified that he repeated to Crytzer that Crytzer was entitled to have a union representative present and additionally told him that the meeting would be delayed until Crytzer could obtain such representation if it was desired. Cupples testified that Crytzer indicated that he did not feel the need to have a representative with him during the meeting. Hoffman and Cupples each corroborated the other's testimony.

The judge found that Crytzer's claim that he asked Cupples whether he should "get a union rep or a lawyer" was undenied, and he credited it. Based on Crytzer's question to Cupples, the judge found that the Respondent had three options: (1) grant Crytzer's request, (2) give him the option of either continuing the hearing unrepresented or foregoing it, or (3) deny the request and terminate the interview. Because the Respondent continued the interview without advising Crytzer of these options, the judge found a violation of Section 8(a)(1).

Our examination of the record reveals that the statement credited by the judge was not undenied. Rather, the Respondent recalled Cupples at the end of the trial and specifically asked him whether "[a]t any time during that day, did Mr. Crytzer inquire of you as to your advice as to whether he should have union representation?" Cupples answered that "[h]e did not."

The judge made no other findings as to the credibility of the witnesses with respect to their differing versions of the November 23 interview. In light of the fact that the critical testimony which the judge apparently credited because it was uncontradicted is in fact contradicted, we remand this portion of the case to the judge for credibility findings and a determination based on those findings as to whether the Respondent violated Section 8(a)(1) as alleged.

## The Information Request

On November 24, Union President Larry Atkins filed a grievance on Crytzer's behalf alleging that termination was too severe for the infraction and seeking a 3-day suspension and warning instead. He also asked

<sup>&</sup>lt;sup>1</sup>The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by issuing a written disciplinary citation to Union Steward Jeffrey Potts for "unacceptable behavior."

<sup>&</sup>lt;sup>2</sup> All dates are in 1993 unless otherwise indicated.

Hoffman at that time for a copy of the statement that Crytzer had signed at the interview on November 23. Hoffman provided Crytzer a copy of his November 23 statement on December 8, and Crytzer provided a copy of it to the Union. Hoffman testified that he told Atkins that he would give a copy of the statement to Crytzer, and, since it was of a "personal nature," Crytzer could supply it to the Union. Hoffman also testified that he was not willing to supply Atkins directly with a copy of the statement.

The judge found that although the Union had a right to receive the statement directly from the Respondent, the evidence showed that Crytzer promptly made it available to the Union and that absent a pattern of bypassing or otherwise denigrating the Union, any harm done was de minimis, and therefore no violation of Section 8(a)(5) and (1) had occurred. We disagree.

As noted by the judge, the Board held in *The New York Times Co.*, 265 NLRB 353 (1982), that "[t]he fact that employees may have the information and may be or are willing to give it to the union does not relieve an employer of its obligation under Section 8(a)(5) of the Act." Id. No special circumstances are present here that would require a different result. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) as alleged by refusing to give a copy of Crytzer's November 23 statement directly to the Union.<sup>3</sup>

### **ORDER**

The National Labor Relations Board orders that the Respondent, Alltel Pennsylvania, Inc., Meadville, Pennsylvania, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Issuing disciplinary warnings to employees for engaging in protected union activity.
- (b) Refusing to furnish necessary information for collective bargaining to the Union.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Remove from its files any reference to the unlawful disciplinary warning given to Jeffrey Potts on August 20, 1993, and notify him in writing that this

has been done and that the warning will not be used against him in any way.

- (b) Furnish to the Union a copy of the November 23, 1993 statement signed by Robert Crytzer which the Union requested on November 24, 1993.
- (c) Post at its facility in Meadville, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the issue of whether the Respondent unlawfully denied Robert Crytzer the right to union representation is remanded to the administrative law judge for the purpose of making credibility determinations, and that he shall prepare and serve on the parties a supplemental decision setting forth his credibility resolutions, findings of fact, conclusions of law, and recommendations to the Board based on those determinations. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

# APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT issue disciplinary warnings to employees for engaging in protected union activity.

WE WILL NOT refuse to furnish necessary information for collective bargaining to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify Jeffrey Potts that we have removed from our files any reference to the unlawful discipli-

<sup>&</sup>lt;sup>3</sup> Member Cohen does not agree that the Respondent violated Sec. 8(a)(5) in this respect. The Respondent told the Union that it was giving a copy of the statement to Crytzer, and that Crytzer could supply it to the Union. Crytzer promptly made it available to the Union. In these circumstances, Member Cohen agrees with the judge that there was no real impact on the collective-bargaining process. He distinguishes *New York Times*, supra, on the basis that, in the instant case, the Respondent told the Union that it could get the information from the employee, and in fact the Union promptly received the information in this fashion.

<sup>&</sup>lt;sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

nary warning given to him on August 20, 1993, and that the warning will not be used against him in any way.

WE WILL furnish to the Union a copy of the November 23, 1993 statement signed by Robert Crytzer which the Union requested on November 24, 1993.

### ALLTEL PENNSYLVANIA, INC.

Leone P. Paradise, Esq., for the General Counsel.

William C. Moul and Bonnie I. O'Neil, Esqs. (Thompson, Hine & Flory), of Columbus, Ohio, for the Respondent.

Jonathan Walters and Deanna L. Forbush, Esqs. (Markowitz & Richman), of Philadelphia, Pennsylvania, for the Charging Party.

#### DECISION

#### STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Meadville, Pennsylvania, on May 19, 1994. The charge was filed December 27, 1993,<sup>1</sup> and the complaint was issued February 28, 1994.

At issue is whether Respondent violated Section 8(a)(1) of the National Labor Relations Act by denying employee Robert Crytzer's request for union representation at an investigatory interview, Section 8(a)(1) and (3) by issuing a disciplinary citation to employee Jeffrey Potts, and Section 8(a)(1) and (5) by failing to provide information relative to the processing of a grievance filed by Crytzer.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following

#### FINDINGS OF FACT/ANALYSIS

#### I. JURISDICTION

Respondent, a corporation, installs and repairs telephone equipment from a facility in Meadville, where it annually purchases and receives goods valued in excess of \$10,000 directly from points outside the Commonwealth of Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

### A. Discipline of Potts

On or about August 13, the acting shop steward for Respondent's cable department (Jeffrey Potts) advised the supervisor for that Department (Larry Barton) that a memorandum issued by the latter concerning overtime policy was not in accord with the applicable collective-bargaining agreement. Barton said he'd talk to his own supervisor and then get back to him. He did not do so.

Near quitting time on August 18 and at the request of a concerned employee (Donald Trudell), Potts went to a meet-

ing of employees called by Barton. In response to Barton's question as to why he was there, Potts stated that an employee had asked for representation; and when Barton asked "which one?" Trudell spoke up and said he had asked for it. Irritated, Barton told Potts there was no need for his presence, and that he didn't want him there because the meeting was for assigning overtime and did not involve discipline. Barton then proceeded to conduct the meeting. Not having been asked to leave, Potts remained throughout. During the meeting Barton told Trudell he would have to work overtime that evening and Trudell, after stating he had a prior commitment, refused the assignment.

On August 19, Potts and Union President Larry Atkins attended a previously scheduled morning meeting in Barton's office. Another supervisor (Roland Wood) was present in addition to Barton. The subject matter was disposed of quickly, and Atkins asked Barton if another matter could be discussed. When Barton replied, "Yes, if its important," Atkins brought up the new overtime procedure asserting it was contrary to the negotiated agreement. Barton began to yell then calmed down and told Atkins that he was coming up with a different policy. Atkins moved on to the related question of Trudell's right to have a union representative present at the prior evening meeting. After fulminating a bit, Barton reiterated his view that representation was unnecessary because he had merely assigned overtime and had not disciplined anyone. At that point Potts opined that if Barton was going to do all the talking and not permit the Union to get a word in "edgewise," he too could talk all day and nothing would be accomplished. With that Barton declared the meeting over, got up, and advanced toward Potts in a manner that prompted Wood to position himself between the two. Barton pointed his finger in Potts' face and ordered him to leave the office. After continuing to sit for a moment, Potts stood up. Barton, restraining himself with effort, repeated the order saying "Jeff, please leave my office." Potts walked toward the door and before exiting turned, looked at Barton, and said: "You're a mean son of a bitch."2

Sometime later that day Barton issued a written disciplinary citation to Trudell for refusing the work assignment on August 18.

Potts received a similar citation on August 20 for "unacceptable behavior" toward a supervisor. It was later reduced to a written verbal warning, the first step under Respondent's progressive disciplinary system.

I find the citation to be in violation of Section 8(a)(1) and (3) of the Act.

The Board has long recognized that negotiations and the administration and resolution of grievances arising under collective-bargaining agreements, because of the very nature of these endeavors, cause tempers frequently to flare, with comments and accusations being made by all sides which would generally not be acceptable conduct on the plant floor. There are numerous cases in which the parties have attacked the veracity, integrity, and good faith of each other as well as their respective parentage and in tones of voice which are not

<sup>&</sup>lt;sup>1</sup> All dates are in 1993 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> Potts, supported by Adkins, claims to have addressed both Barton and Wood, saying: "You're tough sons of bitches to try to talk to." I have credited Barton in this matter finding his account more probable in the circumstances.

always calm, cool, collected, and unintimidating. *Spann Maintenance Co.*, 289 NLRB 915, 920 (1988).

Recognizing that it is generally the employees of the employer who have been elected or designated by the union as officers of the union to represent it in the administration of the contract and the resolution of grievances, the Board has held that employees, when engaged in such activity, are protected by Section 7 of the Act for conduct, attitudes, and statements which might not otherwise be protected. *Trumbull Asphalt Co.*, 220 NLRB 797 (1975); *Huttig Sash & Door Co.*, 154 NLRB 1567 (1965); *Thor Power Tool Co.*, 148 NLRB 1379 (1964).

It is clear that the August 19 meeting involved a dispute over contract interpretation and potential discipline of employee Trudell, and that Potts participated in his official capacity as acting shop steward. Such activity has long been held to be protected under Section 7. *Postal Service*, 250 NLRB 4 (1980).

In these circumstances, I find that Potts' use of the sobriquet "SOB" in referring to Supervisor Barton, following as it did immediately upon Barton's testy and abrupt termination of the meeting and before he had left the room, was not so opprobrious as to carry him "beyond the pale" of the Act's protection. *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970); *Southwestern Bell Telephone Co.*, 260 NLRB 237, 240 (1982).

Employees who have insolently questioned a supervisor's intelligence or called a supervisor a "liar," a "cheat," or an "asshole" while engaged in protected activity have retained their protected status in spite of their remarks. Firch Baking Co., 232 NLRB 772 (1977); Hawaiian Hauling Service, 219 NLRB 765, 766 (1975); Hamlet Steak House, 197 NLRB 632, 635 (1972); Postal Service, 241 NLRB 389, 390 (1979). In Coors Container Co., 238 NLRB 1312, 1320 (1978), an employee engaged in protected activity called a superior a "beaner" and a "Mexican mother fucker" and remained protected under the Act. While Potts' language may have been no better than the quoted expressions, it certainly was no worse.

# B. Weingarten Issue<sup>3</sup>

On the morning of November 23, bargaining unit employee Robert Crytzer was told by Plant Manager Gary Ross to report to the front office. Ross said nothing about any forthcoming discipline.<sup>4</sup>

On arriving at the office Crytzer was met by the chief executive of the plant (Vice President Clark Hoffman) and a man (John Cupples) he recognized as having something to do with plant security. In fact, Cupples was an official in charge of "security and investigations" for an affiliate of Respondent. He had been summoned by Hoffman from the affiliate's office in Hudson, Ohio, and had spent several days investigating a suspected false claim for a \$95.47 hotel bill on a travel voucher submitted by Crytzer.

According to Crytzer, Hoffman "pointed at me and said . . . what you did was wrong . . . I am going to prosecute you . . . I don't care if you have a union representative or

a lawyer sitting beside you . . . we're going through with this. And then he left [the room]."

Continuing, Crytzer states that after Hoffman departed he turned to Cupples and asked "John, what would you do in my place? Would you get a union rep or a lawyer?" He quotes Cupples as replying "Well Clark's a fair guy. Just tell us what happened." Then, after assertedly telling Cupples "I don't want to make Clark any madder than he was" and adding "it would be easy to explain what happened," Crytzer proceeded to do so.<sup>5</sup>

The interrogation lasted about 1-1/2 hours and ended with Crytzer, in the presence of Cupples and Hoffman, signing a 12-line typed statement wherein he admitted misappropriating the amount in question. He claims merely to "glanced" at the statement before signing it while telling Hoffman "If John wrote down what I told him what's in there, then that's what's in there."

For their part Hoffman and Cupples each claim to have advised Crytzer prior to the interview that he had a right to be represented.

An employee has the protected right to union representation at an investigatory interview which he reasonably believes may result in disciplinary action. See *Weingarten*, above. However, such a "right arises only in situations where the employee requests representation." *Weingarten*, supra at 257; *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984).

Crytzer's claim that after Vice President Hoffman confronted him and departed, he turned to Investigator Cupples and asked "John, what would you do in my place? Would you get a union rep or a lawyer?" is undenied, and I credit it.

Although phrased in terms of a question, inquiries similar to that made by Crytzer have uniformly been held sufficient to put the employer on notice as to the employee's desire for representation. New Jersey Bell Telephone Co., 300 NLRB 42 (1990); Montgomery Ward, supra at 1227; NLRB v. Illinois Bell Telephone Co., 251 NLRB 932, 938 (1980), affd. 674 F.2d 618, 622 (7th Cir. 1982); Southwestern Bell Telephone Co., 227 NLRB 1223 (1977). I find that to be the case here.

A valid request for representation having been made, Respondent had three choices: (1) grant Crytzer's request, (2) give him the option of either continuing with the interview unrepresented or foregoing it, or (3) deny the request and terminate the interview. *Montgomery Ward*, above; *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Corp.*, 251 NLRB 850, 857 (1980); *Lennox Industries*, 244 NLRB 607, 608 (1979); *Postal Service*, 241 NLRB 141 (1979).

By continuing the interview without advising Crytzer of these options, Respondent deprived him of his rights under *Weingarten* and thereby violated Section 8(a)(1) of the Act.

# C. Information Request

On November 24 Union President Atkins filed a grievance on Crytzer's behalf, alleging termination was "too demanding for [the] infraction" and seeking a 3-day suspension and

<sup>&</sup>lt;sup>3</sup> NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

<sup>&</sup>lt;sup>4</sup>Over a 2-year period Crytzer had been told to report for discipline at least two times. On both occasions his supervisor told him to bring a union representative because there was a problem.

<sup>&</sup>lt;sup>5</sup> Crytzer explains that he knew what the interview was about because he saw his hotel bill among papers spread on a table in front of Cupples.

warning instead. He also asked Hoffman for a copy of the written statement signed by Crytzer on November 23.

The grievance was denied by Hoffman on December 1; and Atkins claims that on that date, anticipating an appeal to arbitration, he telephoned Hoffman and asked for copies of:

- (a) Crytzer's signed statement.
- (b) his expense report, including hotel voucher, and
- (c) notes taken by Couples during the interview on November 23.

Assertedly, Hoffman said he'd see to it that Cupples provided the written statement, but made no mention of items (2) and (3). A copy of the statement was given to Crytzer on or shortly before December 8 and he promptly gave it to Atkins. The grievance was scheduled for hearing before an arbitrator on July 11, 1994.

Charges in the instant proceeding were filed by the Union on December 27. As pertinent, it therein claimed that the Respondent failed to provide "requested information" relevant to the processing of Crytzer's grievance.

On December 29 Atkins had occasion to meet with Hoffman at the plant. According to Atkins, Hoffman asked what information he needed for the grievance hearing. Atkins asked for (b) and (c) above; and Hoffman promised to provide the former and would check with Investigator Cupples regarding the latter.<sup>6</sup> The hotel bill and expense voucher

were made available to Atkins during the first week of January 1994.

I find no violation.

The statement signed by Crytzer was requested on November 24 and provided on December 8. I find no significant delay. While the Union had a right to receive the statement directly from Respondent (*New York Times Co.*, 265 NLRB 353 (1982)), the evidence shows that Crytzer promptly made it available to Union Agent Atkins; and, absent a pattern of bypassing or otherwise denigrating the Union, any harm done was de minimus.

As to the expense voucher and hotel bill, I credit Hoffman that those items were specifically requested only on December 29; and since they were made available during the following week, here also no significant delay occurred.

Cupples' handwritten notes were destroyed well prior to any claimed oral request therefore; and Hoffman's failure to advise of that circumstance, assuming the notes were specifically requested, is at best harmless oversight.

### CONCLUSION OF LAW

Respondent violated the Act in the particulars and for the reasons stated above; and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

<sup>&</sup>lt;sup>6</sup>It was stipulated that the handwritten notes taken at the investigatory interview by Cupples were destroyed on November 23 just after the statement signed by Crytzer had been typed. The evidence does not disclose whether Adkins knew of that circumstance prior to trial. Hoffman maintains he never received a request for the notes.